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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JULIUS TERRELL,

11 Plaintiff,

12 v.

13 COSTCO WHOLESALE
14 CORPORATION,

15 Defendant.

CASE NO. C16-1415JLR

ORDER DIRECTING BRIEFING

16 **I. INTRODUCTION**

17 Before the court is Plaintiff Julius Terrell's notice regarding the Ninth Circuit's
18 amended opinion in *Syed v. M-I, LLC*, 846 F.3d 1034 (9th Cir. 2017) ("*Syed I*"), *amended*
19 *and superseded on denial of rehearing en banc by Syed v. M-I, LLC*, --- F.3d ---, 2017
20 WL 1050586 (9th Cir. Mar. 20, 2017) ("*Syed II*"). (*Syed* Not. (Dkt. # 51).) The court's
21 recent order denying Defendant Costco Wholesale Corporation's motion to dismiss
22 hinged on the Article III standing analysis that the Ninth Circuit undertook in *Syed I*.

1 (See 3/10/17 Order (Dkt. # 44) at 9-11.) Accordingly, Mr. Terrell brings *Syed II* to the
2 court's attention. (See *Syed* Not. at 2-3.) Having reviewed Mr. Terrell's notice, *Syed I*,
3 *Syed II*, the other applicable law, and the relevant portions of the record, the court
4 DIRECTS the parties to brief the issues discussed below.

5 II. BACKGROUND & ANALYSIS

6 This is a putative class action in which Mr. Terrell alleges that Costco violated the
7 Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, by providing
8 noncompliant disclosures to job applicants. (See generally Compl. (Dkt. # 5-1).) On
9 September 6, 2016, Costco removed this case from King County Superior Court. (See
10 Not. of Removal (Dkt. # 1).) Costco then moved to dismiss the case for lack of Article
11 III standing based on *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540 (2016). (MTD
12 (Dkt. # 19).) Mr. Terrell responded that his allegations supported standing and, at any
13 rate, the case should be remanded—not dismissed—if the court concluded that he lacked
14 standing. (See MTD Resp. (Dkt. # 28).)

15 The court concluded that Mr. Terrell's complaint sufficiently alleged concrete
16 injury and that Mr. Terrell therefore had standing:

17 Costco challenges whether Mr. Terrell pleaded an injury-in-fact by alleging
18 that Costco's Disclosure and Authorization violated Section 1681b(b)(2)(A)
19 of the FCRA, without reference to any additional harm caused by the
20 statutory violation. Costco argues that Mr. Terrell's allegations amount to
21 "bare procedural violations" that are insufficient to establish Article III
22 standing after *Spokeo*. . . . Mr. Terrell simply alleges that Costco's
Disclosure and Authorization violated Section 1681b(b)(2)(A) of the
FCRA. . . .

Analyzing whether Mr. Terrell sufficiently pleaded an injury-in-fact begins
with the nature of the rights conferred by Section 1681b(b)(2)(A). *Thomas*

1 v. *FTS USA, LLC*, 193 F. Supp. 3d 623, 631 (E.D. Va. 2016). “To determine
2 whether an intangible harm constitutes injury in fact, both history and the
3 judgment of Congress are instructive.” *Spokeo*, 136 S. Ct. at 1543; *see also*
4 *Thomas*, 193 F. Supp. 3d at 631 (“[C]ourts have turned to the common law
and to the judgment of Congress, as reflected in the FCRA, to determine
whether the violations of FCRA Section 1681b(b)(2)(A) constitute injuries
capable of satisfying the case or controversy requirement.”). . . .

5 The Ninth Circuit recently addressed the issue before this court, holding that
6 Section 1681b(b)(2)(A) creates substantive rights to information and
7 privacy. [*Syed I*], 846 F.3d at 1040. Accordingly, a defendant who violates
8 these statutory provisions has caused concrete harm. *Id.* “By providing a
9 private cause of action for violations of Section 1681b(b)(2)(A), Congress
has recognized the harm such violations cause, thereby articulating a ‘chain
10 of causation that will give rise to a case or controversy.’” *Id.* (quoting
11 *Spokeo*, 136 S. Ct. at 1549). Consequently, Mr. Terrell has sufficiently pled
12 an injury-in-fact and satisfies the “irreducible constitutional minimum” of
13 standing. *Lujan*, 504 U.S. at 560-61.

14 (3/10/17 Order at 7-8, 10 (internal footnotes omitted).) As the above excerpt
15 demonstrates, this court’s ruling hinged on the *Syed I* court’s conclusions that (1) Section
16 1681b(b)(2)(A) confers a substantive right, and (2) a plaintiff adequately alleges a
17 concrete injury merely by alleging a violation of that provision. (*See id.* at 10.)

18 The Ninth Circuit’s amended opinion—*Syed II*—calls into question whether Mr.
19 Terrell has adequately alleged a concrete injury sufficient to confer standing. *Compare*
20 *Syed I*, 846 F.3d at 1037-40, *with Syed II*, 2017 WL 1050586, at *4-5. In *Syed I*, the
21 court identifies the alleged violations of Section 1681b(b)(2)(A), determines that Section
22 1681b(b)(2)(A) confers substantive rights, and straightforwardly concludes, “Therefore,
Syed has Article III standing to bring this lawsuit.” *Syed I*, 846 F.3d at 1037-40. In *Syed*
II, the court removes that conclusion and replaces it with a paragraph that discusses the

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1 plaintiff's allegations of concrete injury apart from the mere violation of Section
2 1681b(b)(2)(A):

3 Syed alleged in his complaint that he "discovered Defendant M-I's
4 violation(s) within the last two years when he obtained and reviewed his
5 personnel file from Defendant M-I and discovered that Defendant M-I had
6 procured and/or caused to be procured a 'consumer report' regarding him for
7 employment purposes based on the illegal disclosure and authorization
8 form." This allegation is sufficient to infer that Syed was deprived of the
9 right to information and the right to privacy guaranteed by Section
10 1681b(b)(2)(A)(i)-(ii) because it indicates that Syed was not aware that he
11 was signing a waiver authorizing the credit check when he signed it.
12 Drawing all reasonable inferences in favor of the nonmoving party, we can
13 fairly infer that Syed was confused by the inclusion of the liability waiver
14 with the disclosure and would not have signed it had it contained a
15 sufficiently clear disclosure, as required in the statute. Therefore, Syed did
16 allege a concrete injury and has Article III standing to bring this lawsuit.

17 *Syed II*, 2017 WL 1050586, at *5. The Ninth Circuit's additional inquiry into the
18 plaintiff's precise allegations of concrete injury and the reasonable inferences to be drawn
19 therefrom renders infirm the basis for the court's March 10, 2017, conclusion that Mr.
20 Terrell adequately alleged a concrete injury.

21 In light of *Syed II*, Mr. Terrell indicates that he does not oppose remand to King
22 County Superior Court. (*Syed* Not. at 2-3 ("Plaintiff does not wish to expend the Court's
resources on further litigation of this matter only to have Defendant raise the issue of
subject-matter jurisdiction months, or even years, from now. Nor does Plaintiff wish to
litigate under the constant threat of Defendant raising the issue of a lack of subject-matter
jurisdiction.")); *see also id.* at 3 (citing *Mocek v. Allsaints USA Ltd.*, No. 16 C 8484, 2016
WL 7116590, at *2 (N.D. Ill. Dec. 7, 2016)) ("Post-*Spokeo*, when faced with FCRA
cases where neither party chose to affirmatively shoulder the burden of asserting

1 subject-matter jurisdiction, other courts have remanded.”.) Costco has previously taken
2 the position that the court should dismiss the case if the court concludes that Mr. Terrell
3 lacks Article III standing. (MTD at 21-24; MTD Reply (Dkt. # 30) at 10-11.)
4 Furthermore, because *Syed I* was binding authority when the court issued its March 10,
5 2017, order, the court has not analyzed whether Mr. Terrell’s allegations suffice under the
6 approach espoused in *Syed II*. In accordance with the court’s obligation to raise *sua*
7 *sponte* matters that implicate its subject matter jurisdiction, *see Snell v. Cleveland, Inc.*,
8 316 F.3d 822, 826 (9th Cir. 2002) (citing Fed. R. Civ. P. 12(h)(3)), the court DIRECTS
9 the parties to brief the following questions:

- 10 • Whether, in light of *Syed II*, Mr. Terrell has adequately alleged a concrete
11 injury; and
- 12 • Assuming Mr. Terrell has not adequately alleged a concrete injury, whether the
13 court must remand the action or dismiss the action without prejudice.

14 The parties must each file an opening brief and a response brief, and they may not
15 incorporate by reference arguments from past briefing. The opening briefs may not
16 exceed eight (8) pages each and must be filed by April 21, 2017. The response briefs
17 may not exceed four (4) pages each and must be filed by April 28, 2017.

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Dated this th 12 day of April, 2017.

JAMES L. ROBERT
United States District Judge